No. [redacted] 76

In the Supreme Court of the United States

OCTOBER TERM, 1944

JAMES E. MARKHAM, ALIEN PROPERTY CUSTODIAN, AND W. ALEXANDER JULIAN, TREASURER OF THE UNITED STATES, PETITIONERS

v.

HARTWELL CABELL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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The Solicitor General, on behalf of the Alien Property Custodian and the Treasurer of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

Neither the opinion of the district court (R. 15) nor the opinion of the circuit court of appeals (R. 26) has yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered on May 2, 1945 (R. 31). The juris-

diction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Section 9 of the Trading with the Enemy Act, as originally enacted, authorized a creditor of the former owner of enemy property seized by the Alien Property Custodian to bring suit against the Custodian upon the debt. Section 9 (e) of the Act, as amended, provides that no debt shall be allowed "under this section unless it was owing to and owned by the claimant prior to October 6, 1917" and claimed by application filed "prior to the date of the enactment of the Settlement of War Claims Act of 1928." Section 5 (b) of the Act, as amended by the First War Powers Act, 1941, provides that the President or his authorized agent may vest the property of any foreign country or national thereof and that such property may be "used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States".

The question is whether the Act, as amended, permits a creditor of the former owner of property vested during the present war to bring suit against the Custodian despite the temporal limitations of Section 9 (e) and the broad authority granted by the First War Powers Act.

STATUTES INVOLVED

The pertinent provisions of Sections 5 and 9 of the Trading with the Enemy Act, as amended, are set forth in the Appendix.

STATEMENT

This suit was initiated on June 29, 1944, in the United States District Court for the Southern District of New York under the Trading with the Enemy Act, as amended, for the recovery from the Alien Property Custodian[1] of money claimed to be owed to the plaintiff by an Italian insurance company, of which the assets in this country had been vested by the Custodian. The amended complaint, filed on September 13, 1944, alleged the following facts:

> In 1935, the Assicurazioni Generali di Trieste e Venezia, an Italian insurance company, established a branch in the City of New York (R. 3). This branch, known as the General Insurance Company of Trieste and Venice, continued to operate here until July 25, 1941, when it was taken over by the New York Superintendent of Insurance in liquidation proceedings (R. 3–5).

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[1] The plaintiff also named the Treasurer of the United States as a defendant, apparently relying upon that portion of Section 9 (a) of the Trading with the Enemy Act which provides: "* * * to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant."

Prior to the liquidation, the plaintiff had performed legal services both for the Italian company and its United States branch. He filed with the Superintendent of Insurance a claim for about $22,000, constituting fees and disbursements which had been approved but not paid by Assicurazioni (R. 2–6). The Superintendent allowed and paid all but $7,000 which he concluded was a debt due from the Italian company rather than its United States branch (R. 6). The disallowance of $7,000 was upheld by the New York Court of Appeals in February, 1944 (R. 6–7).

In 1942, the Alien Property Custodian issued orders vesting in himself for the benefit of the United States all properties in this country of the Italian company, including all of the properties of the United States branch, except so much of a reserve fund as would be necessary to pay "(1) claims of domestic creditors of such United States branch of said corporation which had been allowed and approved but not paid by said liquidator, (2) claims of domestic creditors of such United States branch of said corporation which are being held in suspense by said liquidator, and (3) liquidation expenses of said liquidator * * *." Vesting Order 218, October 7, 1942, 7 F. R. 9466; Vesting Order 468, December 9, 1942, 8 F. R. 1038. The vested assets were delivered to the Custodian.

The plaintiff filed his claim[2] with the Custodian, but was not paid.

On motion of the defendants the district court dismissed the complaint, holding that the debt claim provisions of Section 9 (a) of the Trading with the Enemy Act, as amended, were deprived of general applicability by the amendments embodied in Section 9 (e); and that in view of the operative dates explicitly set forth in Section 9 (e), Congressional action is necessary to afford a remedy to creditors of property vested during the present war (R. 15–19). The circuit court of appeals, in an opinion by Judge Learned Hand, reversed the judgment, holding that the general language of Section 9 (a) has a continuing vitality, apart from the limitations of Section 9 (e); and that the disqualifying dates introduced by Section 9 (e) apply only to property seized during the last war (R. 26–30).

REASONS FOR GRANTING THE WRIT

1. THE DECISION OF THE CIRCUIT COURT OF APPEALS IS ERRONEOUS

Section 9 of the Trading with the Enemy Act as originally enacted on October 6, 1917, provided without qualification that "any person, not an enemy, or ally of enemy * * * to whom any debt may be owing from an enemy, or ally of

[2] Revising a previous estimate of disbursements, the plaintiff now claims $6,922.02 and interest.

enemy, whose property * * * shall have been conveyed, transferred * * * delivered, or paid to the alien property custodian" might recover upon his debt in a suit against the Custodian. 40 Stat. 419. By the Act of June 5, 1920, Section 9 was divided into several subsections. The general authority to institute suit upon debt claims was retained in Section 9 (a). But Section 9 (e), which was added to the statute at the same time, provided: "nor in any event shall a debt be allowed under this section unless it was owing to and owned by the claimant prior to October 6, 1917." 41 Stat. 977. In 1928, Section 9 (e) was further amended by the addition of a provision that no debt shall "be allowed under this section unless notice of the claim has been filed, or application therefor has been made, prior to the date of the enactment of the Settlement of War Claims Act of 1928." 45 Stat. 271.

We think the language of Section 9 (e) plainly precludes an interpretation limiting its scope to claims against former owners of property seized during the last war. Assuming that Section 9 was originally designed, as its words suggest, to provide a remedy for creditors which, like the remedy of the owner of property mistakenly seized, would arise whenever the Act should be operative in time of war, that purpose was altered by the amendments embodied in Section 9 (e), and the alteration continues to be effective in the

absence of further action by Congress. The prohibition of Section 9 (e) applies, by its terms, "in any event"; it was not limited, as it easily might have been, and as other sections of the Act were,[3] to situations growing out of the last war. The fact that Congress failed on the two separate occasions when Section 9 (e) was the subject of legislative consideration to limit its future applicability in express terms suffices, in our view, to make clear that no such limitation was intended. It is true that the limiting language of Section 9 (e) was adopted with reference to property vested during the last war. But the conclusion is nevertheless inescapable that the device employed by Congress to effectuate that limitation operated by its terms to deprive the general language of Section 9 (a) of the continuing vitality it would otherwise have had. In our view, there can be no difference in effect because Congress, in accordance with the general procedure it adopted at the time, added the disqualifying dates in a separate subdivision instead of incorporating them into Section 9 (a) itself.

That Congress should have been satisfied to destroy the continuing vitality of the debt claim provisions of the Act is not implausible as the Court below assumed. Unsecured creditors of property seized by the United States have no

[3] See, e. g., Section 3 (d) of the original Act: "Whenever, *during the present war* * * *" 40 Stat. 413.

constitutional right to compensation. *Kogler* v. *Miller*, 288 Fed. 806 (C. C. A. 3). See *Pusey & Jones Co.* v. *Hanssen*, 261 U. S. 491, 497; *Banco Mexicano* v. *Deutsche Bank*, 289 Fed. 924, 928 (App. D. C.), *affirmed*, 263 U. S. 591; *Sutherland* v. *Norris*, 24 F. 2d 414, 415 (C. C. A. 3), certiorari denied, 277 U. S. 602; *Synthetic Patents Co.* v. *Sutherland*, 22 F. 2d 491, 494 (C. C. A. 2), certiorari denied, 276 U. S. 630. While their claims are, of course, entitled to respect, the extent to which and the manner in which they should be allowed necessarily pose problems of legislative policy which may be expected to vary from time to time. Not merely the claims of creditors of persons whose property has been vested are involved but also the claims of American owners of property abroad and the more general problem of reparations. It is entirely understandable, therefore, that if Congress at the close of the last war took cognizance at all of the possibility of another conflict, it should have concluded that the question of debt claims as it relates to vested property was one to be faced as the occasion might arise.

Assuming for the purpose of argument that the language of Section 9 (e) is ambiguous enough to permit the interpretation of the court below, we submit that the considerations which should dominate in the process of construction argue convincingly against such an interpretation. If effi-

cient administration of alien property controls in accordance with policies laid down by Congress is given due weight in resolving possible ambiguities, we believe that any construction of Section 9 (e) denying its present effectiveness must be discarded.

By virtue of amendments to Section 5 (b) of the Trading with the Enemy Act, added by the Joint Resolution of May 7, 1940, and by the First War Powers Act, 1941, the executive branch of the Government is now armed with much more comprehensive powers over alien property than were granted by the Act as it had developed during the First World War. Among other things, Section 5 (b), as amended, authorizes the President "through any agency that he may designate" to "regulate, * * * prevent or prohibit, any * * * transactions involving, any property in which any foreign country or a national thereof has any interest." It also provides that "any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States."

In accordance with these two major grants of power, the administration of the Trading with the Enemy Act during the present war has had two major aspects: the regulation of foreign funds, primarily administered by the Treasury Department; and the vesting of alien property, primarily administered by the Office of Alien Property Custodian. See Executive Order 8389, 5 F. R. 1400, 6 F. R. 2897; Executive Order 9193, 7 F. R. 5205.

The regulatory program was initiated immediately after the invasion by the Axis Powers of Denmark and Norway and soon thereafter was given explicit Congressional ratification in the Joint Resolution of May 7, 1940. 54 Stat. 179. Essentially, this program, commonly referred to as the "freezing" or "blocking" of foreign funds, has been aimed at the immobilization of foreign assets in the United States by prohibiting any transactions involving them, unless licensed.

Vesting, on the other hand, was not begun until after Pearl Harbor. The essence of the vesting program is the taking over by the United States of the complete proprietary interest in alien property, thereby making it available without restriction for any affirmative use deemed to be in the national interest.

Regulated alien funds in the United States, consisting principally of cash, securities, and other liquid assets, amount in the aggregate to ap-

proximately $8,000,000,000;[4] vested property, consisting principally of business enterprises, patents, trade-marks and copyrights, real and personal property, ships, and property in the process of judicial administration, amounts to approximately $125,000,000.[5] In the case of frozen funds, overwhelmingly greater in value than vested property, although ownership by the foreign country or national is not disturbed, the property is not available for the payment of debts contracted for by the owners, except at the discretion of the Treasury Department. If the Treasury refuses to grant a license permitting payment of creditors out of blocked funds, it is beyond dispute that neither the creditor nor the owner has any remedy as a matter of right under the Act. The Office of Alien Property Custodian has operated upon the assumption that creditors of former owners of vested property are in no better position than creditors of owners of blocked assets; that although the Custodian, like the Secretary of the Treasury, has discretionary power to pay creditors in appropriate cases by virtue of his authority under Section 5 (b) to "administer," "liquidate," or "otherwise deal with" vested prop-

[4] See *Hearings on H. R. 4840*, 78th Cong., 2d Sess. (1944), 104–106.

[5] See Annual Report of the Office of Alien Property Custodian (1943), 3. The estimate does not include the value of property vested after June 30, 1943, nor of any vested patents, trade-marks and copyrights.

erty in the interest of the United States, he cannot as a matter of law be required to pay debts of former owners of vested property until Congress makes specific provision for their payment by legislative action addressed to the circumstances of the present war.

The decision below destroys consistency in the position of creditors under the Trading with the Enemy Act. It would permit creditors of certain aliens whose property has been vested to maintain suit for recovery of their debt claims, although the debtor no longer owns the property and although typically the property is in active wartime use. At the same time, creditors of aliens whose funds are merely frozen have no compulsory means of exacting payment of debt claims, although the frozen property continues to be owned by their debtors and although it is typically intangible and not now serving any actual productive purpose.

Among creditors of former owners of vested property a further distinction, also without apparent economic justification, would result. If Section 9 (e) were erased by judicial construction in accordance with the decision below, Section 9 (a) would stand without qualification. By its terms, Section 9 (a) permits suits on debt claims only if the debt is one "owing from an enemy or ally of enemy" whose property has been taken. In this war, however, the vesting power has not

been limited to the property of "an enemy or ally of enemy"; by the First War Powers Act, 1941, it has been extended to the property of "any foreign country or national thereof." If the former owner of vested property is a non-enemy foreign national, there is nothing in the Act, even as construed by the court below, which authorizes suit against the Custodian by the former owner's creditors. Yet, in the case of property formerly owned by an enemy, where the considerations justifying unrestricted use by the United States are multiplied, the decision below would permit the operations of the Custodian to be burdened by creditors' lawsuits.

Besides resulting in anomalous distinctions among creditors, the decision below would affirmatively encourage creditors who fall within the scope of Section 9 (a) to bring suit immediately. For the judicial decisions in cases growing out of the First World War make it clear that the debt claim provisions of Section 9 (a), taken by themselves, do not establish any equitably ordered priority in the payment of debts out of seized property. The controlling principle is "first come, first served". *United States* v. *Securities Corporation General*, 4 F. 2d 619 (App. D. C.), *affirmed sub nom. White* v. *Mechanics Securities Corp.*, 269 U. S. 283. Hence, the deletion of Section 9 (e) in accordance with the decision below would start a race of diligence to bring suit on

debt claims. At the least, this would result both in disorderly administration of vested property and inevitable inequities among creditors. Beyond that, it would either impair or terminate entirely the utilization in the war effort of valuable economic resources within the United States.

Applied to the present administration of alien property controls, Section 9 (a), without the limitations of Section 9 (e), would make distinctions among creditors on grounds that have no contemporary significance; would burden the operations of the Office of Alien Property Custodian; would encumber or prevent the use of vested property for war purposes; and would produce inequities among the class of creditors permitted to sue. It is plain that Congress anticipated no such results when it amended the Trading with the Enemy Act in 1940 and again in 1941. The statutory history of the First War Powers Act, 1941, abundantly establishes that Congress deliberately granted the power to vest property "of any foreign country or national thereof" in order to assure that such property would be available for any affirmative use that the national interest in time of war might require.* Survival of the privilege of satisfying debt claims as a matter of right out of vested property is

* See, e. g., Senate Report No. 911, 77th Cong., 1st Sess. (1941), 2; House Report No. 1507, 77th Cong., 1st Sess. (1941), 2–3; remarks of Mr. Hancock, 87 Cong. Rec. 9861.

clearly inconsistent with such an objective. And the explicit grant in Section 5 (b), as amended, of a discretionary power to "administer" or "liquidate" vested property—terms connoting an ordering of creditors' claims on equitable principles—cannot be reconciled with the mandatory "first come, first served" scheme which the cancellation of Section 9 (e) would bring into play.

The inescapable conclusion is that Congress acted upon the assumption that the creditors' remedy provided in Section 9 (a) had been withdrawn by Section 9 (e). We submit that any doubts in the construction of Section 9 (e) should be resolved to support rather than defeat the unmistakably indicated policies of Congress.

2. THE ISSUES ARE OF NATIONAL IMPORTANCE

Since the outbreak of the present war, more than 2000 creditors of former owners of vested property have filed claims with the Alien Property Custodian in an aggregate amount of approximately $100,000,000.[7] Nevertheless, the number of court actions filed against the Custodian on debt claims has been negligible.[8] We believe that this is attributable to the general prevalence of

[7] See *Hearings on H. R. 4840*, 78th Cong., 2d Sess. (1944), 12.

[8] From the outbreak of the present war until the filing of the decision below, the following actions (in addition to the instant case) on unsecured debt claims were initiated: *Yasui* v. *Crowley*, Civil Action Nos. 21-451, 21-452, 21-453, S. D. N. Y. (actions voluntarily dismissed, January, 1944);

the view that the Trading with the Enemy Act, as amended, does not authorize such suits.[9] If the decision below should stand unchanged, a great volume of litigation will inevitably confront the Custodian in the near future.[10]

The decision below resolves judicially questions of war and postwar policy on which Congress has not yet acted. Although the First War Powers Act, 1941, enlarges the affirmative powers of the

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Hayden v. *Crowley*, Civil File No. 811, W. D. Wash (complaint dismissed on other grounds, upon defendant's motion, May, 1944; affirmed on reconsideration, July, 1944); *Hayden* v. *Crowley*, Civil File No. 852, W. D. Wash. (filed, December, 1943; hearing date not yet requested by plaintiff); *Roegelein* v. *Markham*, Civil Action No. 635, W. D. Texas (filed, January, 1945).

[9] During the second session of the Seventy-Eighth Congress, a subcommittee of the House Judiciary Committee held extensive hearings upon H. R. 4840 (later amended and reintroduced as H. R. 5031), a bill to amend the First War Powers Act, 1941. See *Hearings on H. R. 4840, 78th Cong., 2d Sess. (1944)*. The session expired before final action was taken. The bill specified a detailed procedure for equitable disposition of creditors' claims, but payment was "permissive rather than mandatory on the Custodian." *Hearings*, 115. The hearings reveal unanimous understanding that under presently existing law, creditors cannot proceed against the Custodian as a matter of right. See, *e. g.*, Statement on Behalf of Special Committee on Custody and Management of Alien Property, American Bar Association, *Hearings*, 38, 55.

[10] See, e. g., *Stasi* v. *Markham*, Civil Action No. 5196, D. N. J. (filed, April, 1945) in which the plaintiff, who since December, 1942, had held a judgment against the former owner of vested property without bringing suit upon it, initiated action to recover upon his claim a few days after the decision below was rendered.

executive branch in dealing with alien property under Section 5 (b) of the Trading with the Enemy Act, it refers only indirectly and incidentally to the problem of debt claimants. We believe, moreover, that the First War Powers Act reveals a Congressional understanding that, for the present, debt claimants cannot proceed against the Custodian as a matter of right. The operations of the Office of Alien Property Custodian have proceeded on the assumption that Congress has deliberately postponed comprehensive consideration of this problem until problems of war settlement and international relations with which it is fundamentally connected can be appropriately dealt with at the same time.

Since the court below has not only resolved a complicated question of national policy without the benefit of positive direction from Congress, but has resolved it in a manner which would basically reshape the operations of the Office of Alien Property Custodian, the correctness of its decision should be reviewed by this Court.

CONCLUSION

The circuit court of appeals has erroneously decided an important question of federal law which has not been but should be settled by this Court. It is therefore respectfully submitted that this petition should be granted.

HUGH B. COX,
Acting Solicitor General.

MAY 1945.

APPENDIX

Trading with the Enemy Act, c. 106, 40 Stat. 411, as amended, 50 U. S. C. App. 1–31:

Sec. 5 [as amended by the First War Powers Act, 1941, c. 593, Sec. 301, 55 Stat. 839, 50 U. S. C. App., Supp. III, 616]:

(b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest, by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the

terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; * * *

Sec. 9 (a). Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any per-

son from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be en-

tered against the claimant or suit otherwise terminated.

Sec. 9 (e). No money or other property shall be returned nor any debt allowed under this section to any person who is a citizen or subject of any nation which was associated with the United States in the prosecution of the war, unless such nation in like case extends reciprocal rights to citizens of the United States * * * nor in any event shall a debt be allowed under this section unless it was owing to and owned by the claimant prior to October 6, 1917, and as to claimants other than citizens of the United States unless it arose with reference to the money or other property held by the Alien Property Custodian or Treasurer of the United States hereunder; nor shall a debt be allowed under this section unless notice of the claim has been filed, or application therefor has been made, prior to the date of the enactment of the Settlement of War Claims Act of 1928.

U. S. GOVERNMENT PRINTING OFFICE: 1948

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OPINIONS BELOW

The opinion of the District Court (R. 9) has not been reported. The opinion of the Circuit Court of Appeals (R. 14) is reported in 148 F. 2d 737.

JURISDICTION

The decision of the Circuit Court of Appeals was rendered on April 3, 1945, and judgment entered on May 2, 1945 (R. 17). Petition for writ of certiorari was filed on May 15, 1945, and granted on June 4, 1945 (R. 17). The jurisdic-

tion of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATEMENT

This suit was initiated on June 29, 1944, in the United States District Court for the Southern District of New York under the Trading with the Enemy Act, as amended, for the recovery from the Alien Property Custodian[1] of money claimed to be owed to the plaintiff by an Italian insurance company, of which the assets in this country had been vested by the Custodian. The amended complaint, filed on September 13, 1944, alleged the following facts:

In 1935, the Assicurazioni Generali di Trieste e Venezia, an Italian insurance company established a branch in the City of New York (R. 2). This branch, known as the General Insurance Company of Trieste and Venice, continued to operate here until July 25, 1941, when it was taken over by the New York Superintendent of Insurance in liquidation proceedings (R. 2–3).

Prior to the liquidation, the plaintiff had performed legal services both for the Italian com-

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In 1942, the Alien Property Custodian issued orders vesting in himself for the benefit of the United States all properties in this country of the Italian company, including all of the properties of the United States branch, except so much of a reserve fund as would be necessary to pay "(1) claims of domestic creditors of such United States branch of said corporation which have been allowed and approved but not paid by said liquidator, (2) claims of domestic creditors of such United States branch of said corporation which are being held in suspense by said liquidator, and (3) liquidation expenses of said liquidator * * *." Vesting Order 218, October 7, 1942, 7 F. R. 9466; Vesting Order 468, December 9, 1942, 8 F. R. 1038 (R. 5). The vested assets were delivered to the Custodian.

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The complaint, alleging the foregoing facts, was dismissed on motion of the defendants, the district court holding that the debt claim provisions of Section 9 (a) of the Trading with the Enemy Act, as amended, were deprived of general applicability by the amendments embodied in Section 9 (e); and that in view of the operative dates explicitly set forth in Section 9 (e), Congressional action is necessary to afford a remedy to creditors of property vested during the present war (R. 9–11). The circuit court of appeals reversed the judgment, holding that the general language of Section 9 (a) has a continuing vitality, apart from the limitations of Section 9 (e); and that the disqualifying dates introduced by Section 9 (e) apply only to property seized during the last war (R. 14–16).

STATUTES INVOLVED

The pertinent provisions of Sections 5 and 9 of the Trading with the Enemy Act, as amended, are set forth in the Appendix, *infra*, pp. 25–28.

QUESTION PRESENTED

Section 9 of the Trading with the Enemy Act, as originally enacted, authorized a creditor of the former owner of enemy property seized by the Alien Property Custodian to bring suit against the Custodian upon the debt. Section 9 (e) of the Act, as amended, provides that no debt shall be allowed "under this section unless it was

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The question is whether the Act, as amended, permits a creditor of the former owner of property vested during the present war to bring suit against the Custodian despite the temporal limitations of Section 9 (e) and the broad authority granted by the First War Powers Act.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that Section 9 (e) of the Trading with the Enemy Act, as amended, is limited in application to seizures made during the first world war.

2. In reversing the judgment of the District Court.

SUMMARY OF ARGUMENT

Section 9 (e) of the Trading with the Enemy Act unambiguously prohibits payment of unsecured creditors of former owners of vested property if the debts arose after October 6, 1917.

This provision, well adapted to the problems of the first World War confronting Congress at the time of its enactment, appropriately left for future congressional determination the question of restoration of creditors' remedies in the event that the problem should be presented again by the outbreak of another war. Since Congress has not yet granted any remedy assertible against the Custodian by an unsecured creditor of the former owner of property vested during this war, there is no basis upon which the respondent's suit can be maintained.

To construe Section 9 (e) as permitting this suit, in spite of its plain meaning to the contrary, would create economic and administrative anomalies gravely burdening the administration of the alien property controls fashioned for this war. When the original debt claim provisions of the Trading with the Enemy Act were enacted in 1917, the authority to seize alien property extended to the property of enemies and allies of enemies only. Hence, creditors' remedies were correspondingly limited to debts "owing from an enemy or ally of enemy". By the First War Powers Act, 1941, however, the Trading with the Enemy Act was amended to authorize, among other things, the vesting of property of all foreign countries or nationals thereof. By denying all effect to Section 9 (e), the decision below would restore the debt claim provisions of the

original Act, and make them applicable to a situation not contemplated when they were enacted and in which they have no logical place. They would, for example, afford no remedy for creditors of friendly aliens whose property may have been vested for protective or conservatory purposes only, and at the same time they would permit creditors of enemies to interfere with the wartime utilization by the United States of property in this country of enemy origin. This and other anachronistic and discriminatory results of disregarding the plain meaning of Section 9 (e) would defeat a major objective sought by Congress in enacting the First War Powers Act, 1941: complete flexibility in utilizing alien property in the United States for national wartime needs.

During this war unsecured creditors of former owners of vested property have filed claims with the Alien Property Custodian amounting in the aggregate to more than $100,000,000, although the volume of suits brought on such claims has been almost negligible. Nullification of Section 9 (e) by court decision would resolve the question of ultimate disposition of these claims without guidance from Congress, and in advance of congressional action upon war settlements, reparations, and other fundamentally related matters. That a question of such national importance and such complexity is not adequately cognizable in a

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creditor's suit confirms the wisdom of the Congress of 1920 in cutting off remedies for all holders of post-1917 unsecured debt claims until a subsequent Congress, after appropriate deliberation, should prescribe otherwise.

ARGUMENT

I

SECTION 9 (e) OF THE TRADING WITH THE ENEMY ACT, AS AMENDED, IN TERMS PRECLUDES THE MAINTENANCE OF SUIT UPON A DEBT CLAIM ARISING AFTER OCTOBER 6, 1917

Section 9 of the Trading with the Enemy Act, as originally enacted during the first World War, provided, without qualification, that "any person, not an enemy, or ally of enemy * * * to whom any debt may be owing from an enemy, or ally of enemy, whose property * * * shall have been conveyed, transferred * * * delivered, or paid to the alien property custodian" might recover upon his debt in a suit against the Custodian. 40 Stat. 419. By an amendment of June 5, 1920, Section 9 was divided into several subsections. The authority to institute suit upon debt claims was retained as part of Section 9 (a); and Section 9 (e) was added providing in part: "nor in any event shall a debt be allowed under this section unless it was owing to and owned by the claimant prior to October 6, 1917." 41 Stat. 977.[3] In 1928, Section 9 (e) was fur-

[3] The court below asserted (R. 14–15) that the Act "from the first * * * provided that no debt should be paid

ther amended by the addition of a provision that no debt shall "be allowed under this section unless notice of the claim has been filed, or application therefor has been made, prior to the date of the enactment of the Settlement of War Claims Act of 1928." 45 Stat. 271.

We think the terms of Section 9 (e) plainly preclude an interpretation limiting its restrictive effect to claims against former owners of property seized during the last war. Assuming that Section 9 was originally designed to provide a remedy for creditors which, like the remedy of the owner of property mistakenly seized, would arise whenever the Act should be operative in time of war, that purpose was altered by the

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which had not been 'owing' before October 6, 1917." Section 9 of the Act originally provided in part:

"That any person, not an enemy, or ally of enemy, claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the alien property custodian hereunder, * * * or to whom any debt may be owing from an enemy, or ally of enemy, whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the alien property custodian hereunder, * * * may file with the said custodian a notice of his claim * * *. If the President shall not so order within sixty days after the filing of such application, or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may, at any time before the expiration of six months after the end of the war, institute a suit in equity in the district court of the United States * * * (to which suit the alien property custodian or the Treasurer of the United States, as the case may be, shall be

amendments embodied in Section 9 (e), and the alteration continues to be effective in the absence of further action by Congress. The limitation with respect to creditors' claims embodied in subsection (e) is cast in language as broad as the language of subsection (a) which grants creditors a remedy. By its terms, Section 9 (e) applies "in any event"; it was not restricted, as it easily might have been, and as other sections of the Act were,[4] to situations growing out of the last war. In our view, there can be no difference in effect

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made a party defendant), to establish the interest, right, title, or debt so claimed. * * *"

The assertion by the court below was apparently based on one of two grounds. The court may have assumed that debts arising after the passage of the Act (October 6, 1917) were unenforceable because they necessarily arose out of prohibited trading with the enemy. This assumption overlooks the provisions authorizing the President to license transactions with the enemy. Or, the court may have assumed that the statutory phrase "may be owing", meant "may be owing at the time of enactment." This assumption overlooks the use of the similar phrase "claiming any interest," in connection with the remedy for return of interests in the seized property itself; it is clear that such claims were not limited to those arising before October 6, 1917.

But even if the court's construction of the original provisions of Section 9 be accepted, it would not impair our position that the express language adopted in the 1920 amendments precludes maintenance of a suit on a debt claim arising at any time after October 6, 1917, and that the effective administration of the statute demands a reading of Section 9 (e) in accordance with its terms.

[4] See, e. g., Section 3 (d) of the original Act: "Whenever, during the present war * * *" 40 Stat. 413.

because Congress, in accordance with the general procedure it adopted at the time, added the disqualifying dates in a separate subdivision instead of incorporating them into Section 9 (a) itself. The conclusion is inescapable that the device employed by Congress effectively deprived the debt claim provision of Section 9 (a) of the continuing vitality it would otherwise have had. Moreover, the fact that Congress failed in 1928, when Section 9 (e) was again the subject of legislative consideration, to limit its future applicability in express terms is further confirmation that no such limitation was intended.

That Congress should have been satisfied to destroy the continuing vitality of the debt claim provisions of the Act is not, as the court below assumed, implausible. Unsecured creditors of former owners of property seized by the United States have no constitutional right to compensation.[5] *Kogler* v. *Miller,* 288 Fed. 806 (C. C. A. 3). See *Pusey & Jones Co.* v. *Hanssen,* 261 U. S. 491, 497; *Banco Mexicano* v. *Deutsche Bank,* 289 Fed. 924, 928 (App. D. C.), *affirmed,* 263 U. S. 591; *Sutherland* v. *Norris,* 24 F. 2d 414, 415 (C. C. A.

[5] The respondent's suggestion to the contrary (Brief in Opposition, pp. 10–11) is unsupported by the cases. The authorities cited, referring as they do to the protection afforded by the Constitution to persons whose *property* is taken without authority of law, are not relevant to the problem of unsecured creditors of debtors whose assets have been reduced by virtue of vesting by the United States.

3), certiorari denied, 277 U. S. 602; *Synthetic Patents Co.* v. *Sutherland,* 22 F. 2d 491, 494 (C. C. A. 2), certiorari denied, 276 U. S. 630. While their claims are, of course, an appropriate subject for Congressional consideration, the extent to which and the manner in which they should be allowed necessarily pose problems of legislative policy which may be expected to vary from time to time. Not merely the claims of creditors of persons whose property has been vested are involved but also the claims of American owners of property abroad and the more general problem of reparations. It is entirely understandable, therefore, that if Congress at the close of the last war took cognizance at all of the possibility of another conflict, it should have concluded that the question of debt claims as it relates to vested property was one to be faced as the occasion might arise.[6]

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[6] The policies which Congress sought to effectuate do not appear to have been explicitly stated in the hearings, committee reports, or discussions on the floor preceding the enactment of Section 9 (e). See Hearings on H. R. 14208, May, 1920, 66th Cong., 2d Sess.; House Report No. 1089, 66th Cong., 2d Sess. Section 9 (e) itself, however, discloses that Congress made a reasonable disposition of the problems confronting it. The original Act of 1917 had granted rights to pre-1917 creditors, and many such creditors had in fact recovered. See Alien Property Custodian Report (1919), Senate Doc. No. 435, 65th Cong., 3d Sess., pp. 472–482. Hence, if Congress had withdrawn creditors' remedies entirely, it would have made an arbitrary discrimination against those pre-1917 creditors who had either deliberately refrained from perfecting their claims by suit against the

II

CONSTRUCTION OF SECTION 9 (e) TO PERMIT SUIT ON UNSECURED DEBTS ARISING AFTER OCTOBER 6, 1917, WOULD MAKE IT IMPOSSIBLE TO ADMINISTER ALIEN PROPERTY CONTROLS IN ACCORDANCE WITH POLICIES WHICH CONGRESS HAS EMBODIED IN THE MOST RECENT AMENDMENTS OF THE TRADING WITH THE ENEMY ACT

Assuming for the purpose of argument that there is sufficient ambiguity in the language of Section (e) to give room for interpretation, we submit that the considerations which should dominate in the process of construction argue convincingly against the interpretation of the court below. For a construction which denies present effectiveness to the limitations of Section 9 (e) would gravely interfere with the efficient administration of alien property controls in accordance with policies laid down by Congress in relation to World War II.

By virtue of amendments to Section 5 (b) of the Trading with the Enemy Act, added by the Joint Resolution of May 7, 1940, and by the First War Powers Act, 1941, the executive branch of the Government is now armed with much more comprehensive power over alien property, with respect both to the range of authorized controls

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United States during the war or who had been unable to assert their claims because of difficulties in communications or other wartime conditions. By preserving a remedy for pre-1917 creditors only, but for all of them, Congress avoided such a discrimination and at the same time saved the question of debt claims in the event of a future war for resolution by a future Congress acting in the light of contemporaneous conditions.

and to the range of foreign interests to which they may be applied, than were granted by the Act as it had developed during the First World War. 54 Stat. 179; 55 Stat. 839. Among other things, Section 5 (b), as amended, authorizes the President "through any agency that he may designate" to "regulate, * * * prevent or prohibit, any * * * transactions involving, any property in which any foreign country or a national thereof has any interest." It also provides that "any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States."

In accordance with these two major grants of power, the administration of the Trading with the Enemy Act during the present war has had two major aspects: the regulation of foreign funds, primarily administered by the Treasury Department; and the vesting of alien property, primarily administered by the Office of Alien Property Custodian. See Executive Order 8389, 5 F. R. 1400, 6 F. R. 2897; Executive Order 9193, 7 F. R. 5205.

The regulatory program was initiated immediately after the invasion by the Axis Powers of Denmark and Norway and soon thereafter was given explicit Congressional ratification in the Joint Resolution of May 7, 1940, *supra*. Essentially, this program, commonly referred to as the "freezing" or "blocking" of foreign funds, has been aimed at the immobilization of foreign assets in the United States by prohibiting any transactions involving them, unless licensed.

Vesting, on the other hand, was not begun until after Pearl Harbor. The essence of the vesting program is the acquisition by the United States of the complete proprietary interest in alien property, rendering it available without restriction for any affirmative use deemed to be in the national interest.

Regulated alien funds in the United States, consisting principally of cash, securities, and other liquid assets, amount in the aggregate to approximately $8,000,000,000;[7] vested property, consisting principally of business enterprises, patents, trade-marks and copyrights, real and personal property, ships, and property in the process of judicial administration, amounts to approximately $212,400,000.[8] In the case of frozen

[7] See Hearings on H. R. 4840, 78th Cong., 2d Sess. (1944), 104–106.

[8] See Annual Report of the Office of Alien Property Custodian (1944), 14, 16. The estimate does not include the value of property vested after June 30, 1944, nor of any

funds, overwhelmingly greater in value than vested property, although ownership by the foreign country or national is not disturbed, the property is not available for the payment of debts contracted for by the owners, except at the discretion of the Treasury Department. If the Treasury refuses to grant a license permitting payment of creditors out of blocked funds, it is beyond dispute that neither the creditor nor the owner has any remedy as a matter of right under the Act. The Office of Alien Property Custodian has operated upon the assumption that creditors of former owners of vested property are in no better position than creditors of owners of blocked assets; that although the Custodian, like the Secretary of the Treasury, has discretionary power to pay creditors in appropriate cases by virtue of his authority under Section 5 (b) to "administer," "liquidate," or "otherwise deal with" vested property in the interest of the United States, he cannot as a matter of law be required to pay debts of former owners of vested property until Congress makes specific provision for their pay-

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vested patents, trade-marks and copyrights. Executive Order 9567, issued on June 8, 1945, articulates the Custodian's authority to vest certain cash, funds, securities, credits, and other property of Germans and Japanese which had previously been subjected to freezing controls only. 10 F. R. 6917. It has been estimated that this source will add approximately $220,000,000 to the aggregate value of vested property. See New York Times, June 10, 1945, p. 10, col. 1.

ment by legislative action addressed to the circumstances of the present war.

The decision below destroys consistency in the position of creditors under the Trading with the Enemy Act. It would permit creditors of certain aliens whose property has been vested to maintain suit for recovery of their debt claims, although the debtor no longer owns the property and although typically the property has been in active wartime use. At the same time, creditors of aliens whose funds are merely frozen have no compulsory means of exacting payment of debt claims, although the frozen property continues to be owned by their debtors and although it is typically intangible and has not been serving any actual productive purpose.

Among creditors of former owners of vested property a further distinction, also without apparent economic justification, would result. If Section 9 (e) were erased by judicial construction in accordance with the decision below, Section 9 (a) would stand without qualification. By its terms, Section 9 (a) permits suits on debt claims only if the debt is one "owing from an enemy or ally of enemy" whose property has been taken. In this war, however, the vesting power has not been limited to the property of "an enemy or ally of enemy"; by the First War Powers Act, 1941, *supra,* it has been extended to the property of

"any foreign country or national thereof." If the former owner of vested property is a non-enemy foreign national, there is nothing in the Act, even as construed by the court below, which authorizes suit against the Custodian by the former owner's creditors. Yet, in the case of property formerly owned by an enemy, where the considerations justifying unrestricted use by the United States are multiplied, the decision below would permit the operations of the Custodian to be burdened by creditors' lawsuits.

Besides resulting in anomalous distinctions among creditors, the decision below would affirmatively encourage creditors who fall within the scope of Section 9 (a) to bring suit immediately. For the judicial decisions in cases growing out of the First World War make it clear that the debt claim provisions of Section 9 (a), taken by themselves, do not establish any equitably ordered priority in the payment of debts out of seized property. The controlling principle is "first come, first served". *United States* v. *Securities Corporation General*, 4 F. 2d 619 (App. D. C.), affirmed *sub nom. White* v. *Mechanics Securities Corp.*, 269 U. S. 283. Hence, the deletion of Section 9 (e) in accordance with the decision below would start a race of diligence to bring suit on debt claims. At the least, this would result both in disorderly administration of vested property

and inevitable inequities among creditors.* Beyond that, it would either impair or terminate entirely the utilization, both in time of war and during the period of postwar adjustment, of valuable economic resources within the United States.

Applied to the present administration of alien property controls, Section 9 (a), without the limitations of Section 9 (e), would make distinctions among creditors on grounds that have no contemporary significance; would burden the operations of the Office of Alien Property Custodian; would encumber or prevent the use of vested property for national purposes; and would produce inequities among the class of creditors permitted to sue. It is plain that Congress anticipated no such results when it amended the Trading with the Enemy Act in 1940 and again in 1941. The statutory history of the First War Powers Act, 1941, abundantly establishes that

* "It would not be meaningful to view the total amount of claims against vested property in juxtaposition with the total amount of property vested in the Custodian. For it must be understood that claims are filed, not against all vested property, but against specific items of vested property. The total amount of the claims against a piece of property frequently exceeds the value of the property. * * * If all debt claims which mention an amount (other than tax claims, secured claims, and irregular claims) were to be allowed in full and the entire value of the property in question devoted to satisfying them * * * a total of $36,887,000 might be realized out of a total of $104,017,000 claimed." Annual Report of the Office of Alien Property Custodian (1944) 139–140.

Congress deliberately granted the power to vest property "of any foreign country or national thereof" in order to assure that such property would be available for any affirmative use that the national interest in time of war might require.[10] Survival of the privilege of satisfying debt claims as a matter of right out of vested property is clearly inconsistent with such an objective. And the explicit grant in Section 5 (b), as amended, of a discretionary power to "administer", or "liquidate" vested property—terms connoting an ordering of creditors' claims on equitable principles—cannot be reconciled with the mandatory "first come, first served" scheme which the cancellation of Section 9 (e) would bring into play.

The inescapable conclusion is that Congress acted upon the assumption that the creditors' remedy provided in Section 9 (a) had been withdrawn by Section 9 (e). Any doubts in the construction of Section 9 (e) should be resolved to support rather than defeat the unmistakably indicated policies of Congress. Actionable rights against the United States must be granted by Congress and, in the absence of the most compelling circumstances, are not to be inferred or extended beyond the terms of the grant. Where,

[10] See, e. g., Senate Report No. 911, 77th Cong., 1st Sess. (1941), 2; House Report No. 1507, 77th Cong., 1st Sess. (1941), 2-3; remarks of Mr. Hancock, 87 Cong. Rec. 9861.

as here, such inference or extension would nullify a dominant policy of a major wartime statute, the strong presumption against departing from a plain congressional direction must prevail. Cf. *United States* v. *Sherwood*, 312 U. S. 584, 590–592.

III

THE DECISION BELOW RESOLVES ISSUES OF POLICY WHICH SHOULD AWAIT ACTION BY CONGRESS

Since the outbreak of the present war, 1,411 unsecured creditors of former owners of vested property have filed claims with the Alien Property Custodian in an aggregate amount of $104,017,000.[11] Nevertheless, the number of court actions filed against the Custodian on debt claims has been negligible.[12] We believe that this is attributable to the general prevalence of the view that the Trading with the Enemy Act, as amended, does

[11] Annual Report of the Office of Alien Property Custodian (1944) 138.

[12] From the outbreak of the present war until the filing of the decision below, the following actions (in addition to the instant case) on unsecured debt claims were initiated: *Yasui* v. *Crowley*, Civil Action Nos. 21–451, 21–452, 21–453, S. D. N. Y. (actions voluntarily dismissed, January, 1944); *Hayden* v. *Crowley*, Civil File No. 811, W. D. Wash. (complaint dismissed on other grounds, upon defendant's motion, May, 1944; affirmed on reconsideration, July, 1944); *Hayden* v. *Crowley*, Civil File No. 852, W. D. Wash. (filed, December, 1943; hearing date not yet requested by plaintiff); *Roegelein* v. *Markham*, Civil Action No. 635, W. D. Texas (filed, January, 1945).

not authorize such suits.[13] If the decision below should stand unchanged, a great volume of litigation will inevitably confront the Custodian in the near future.[14]

The decision below resolves judicially questions of war and postwar policy on which Congress has not yet acted. Although the First War Powers Act, 1941, enlarges the affirmative powers of the executive branch in dealing with alien property under Section 5 (b) of the Trading with the Enemy Act, it touches only indirectly and incidentally on the problem of debt claims, by refer-

[13] During the second session of the Seventy-Eighth Congress, a subcommittee of the House Judiciary Committee held extensive hearings upon H. R. 4840 (later amended and reintroduced as H. R. 5031), a bill to amend the First War Powers Act, 1941. See Hearings on H. R. 4840, 78th Cong., 2d Sess (1944). The session expired before final action was taken. The bill specified a detailed procedure for equitable disposition of creditors' claims, but payment was "permissive rather than mandatory on the Custodian." Hearings, 115. The hearings reveal unanimous understanding that under presently existing law, creditors cannot proceed against the Custodian as a matter of right. See, *e. g.*, Statement on Behalf of Special Committee on Custody and Management of Alien Property, American Bar Association, Hearings, 38, 55.

[14] See, e. g., *Stasi* v. *Markham*, Civil Action No. 5196, D. N. J. (filed, April, 1945) in which the plaintiff, who since December, 1942, had held a judgment against the former owner of vested property without bringing suit upon it, initiated action to recover upon his claim a few days after the decision below was rendered. Counsel have agreed to postpone hearing pending final judgment in this case. See also *Lehmann* v. *Markham*, Civil Action No. 32–187, S. D. N. Y. (filed, July, 1945).

ence to administration and liquidation of vested property. We believe, moreover, that the First War Powers Act reveals a Congressional understanding that, for the present, debt claimants cannot proceed against the Custodian as a matter of right. The operations of the Office of Alien Property Custodian have proceeded on the assumption that Congress has deliberately postponed comprehensive consideration of this problem until problems of war settlement and international relations with which it is fundamentally connected can be appropriately dealt with at the same time.[15]

[15] Cf. *United States* v. *Amer. Trucking Ass'ns*, 310 U. S. 534, 549: "The Commission and the Wage and Hour Division, as we have said, have both interpreted § 204 (a) as relating solely to safety of operation. In any case such interpretations are entitled to great weight. This is peculiarly true here where the interpretations involve 'contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.'"

CONCLUSION

For the reasons stated, the judgment of the Circuit Court of Appeals should be reversed and that of the District Court affirmed.

Respectfully submitted,

HAROLD JUDSON,
Acting Solicitor General.
HERBERT WECHSLER,
Assistant Attorney General.
M. S. ISENBERGH,
Special Assistant to the Attorney General.
RAOUL BERGER,
General Counsel, Office of Alien Property Custodian.

OCTOBER 1945.

APPENDIX

Trading with the Enemy Act, c. 106, 40 Stat. 411, as amended, 50 U. S. C. App. 1–31:

SEC. 5 [as amended by Title III of the First War Powers Act, 1941, c. 593, Sec. 301, 55 Stat. 839, 50 U. S. C. App., Supp. IV, 616]:

> (b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—
>
> (A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and
>
> (B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,
>
> by any person, or with respect to any property, subject to the jurisdiction of the

United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; * * *

SEC. 9 (a). That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of

the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided,* That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the

Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

SEC. 9 (e). No money or other property shall be returned nor any debt allowed under this section to any person who is a citizen or subject of any nation which was associated with the United States in the prosecution of the war, unless such nation in like case extends reciprocal rights to citizens of the United States * * * nor in any event shall a debt be allowed under this section unless it was owing to and owned by the claimant prior to October 6, 1917, and as to claimants other than citizens of the United States unless it arose with reference to the money or other property held by the Alien Property Custodian or Treasurer of the United States hereunder; nor shall a debt be allowed under this section unless notice of the claim has been filed, or application therefor has been made, prior to the date of the enactment of the Settlement of War Claims Act of 1928.

U. S. GOVERNMENT PRINTING OFFICE: 1941

IN THE

Supreme Court of the United States

OCTOBER TERM—1944

No. 1271 76

JAMES E. MARKHAM, Alien Property Custodian, and W. ALEXANDER JULIAN, Treasurer of the United States,

Petitioners,

vs.

HARTWELL CABELL,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHARLTON OGBURN,
Counsel for Respondent.

HARTWELL CABELL,
Respondent Pro Se.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 76

JAMES E. MARKHAM, ALIEN PROPERTY CUSTODIAN, AND W. ALEXANDER JULIAN, TREASURER OF THE UNITED STATES, PETITIONERS

vs.

HARTWELL CABELL

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MAY 15, 1945
CERTIORARI GRANTED JUNE 4, 1945

SUPREME COURT OF THE UNITED STATES

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HARTWELL CABELL, PLAINTIFF-APPELLANT

v.

JAMES E. MARKHAM, ALIEN PROPERTY CUSTODIAN, AND W. ALEXANDER JULIAN, TREASURER OF THE UNITED STATES, DEFENDANT-APPELLEES

Statement under rule XIII

This proceeding was commenced on June 29th, 1944, by the filing of the complaint herein and the issuance of a 60-day summons addressed to the defendants.

On August 29th, 1944, the defendants filed a notice of motion for judgment dismissing the complaint upon six stated grounds. The plaintiff, however, by consent, filed an amended complaint on September 13, 1944, and the motion to dismiss the original complaint was thereupon withdrawn.

On September 22nd, 1944, the defendants filed a notice of motion for judgment dismissing the amended complaint upon four stated grounds. This motion came on to be heard before Hon. John Bright, District Judge, on November 28th, 1944. On the argument the defendants withdrew the last two grounds stated in their notice of motion in so far as this case is concerned.

2 The opinion granting the motion to dismiss the amended complaint without prejudice was filed January 4, 1945. The order and judgment dismissing the amended complaint without prejudice was entered January 11, 1945.

The notice of appeal was filed January 18th, 1945.

There has been no change of parties since this proceeding was commenced.

In District Court of the United States for the Southern District of New York

(Same title.)

Amended complaint

This action arises under the Trading with the Enemy Act of October 6th, 1917 (40 Stat. L. 411), as amended and supplemented. The matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.

1. Plaintiff is not a National of a foreign or enemy country, but is a citizen of the United States and is now and during the period in which the legal services hereafter were rendered and disburse-

ments made, was, a member of the New York Bar, residing within the Southern Judicial District of New York. During that period and until the latter part of the year 1942 he was senior partner of the law firm of Cabell & Cabell. That firm, which was composed of the plaintiff and one William D. Cabell, was at that time dissolved owing to the appointment of William D. Cabell as Lieutenant of the United States Navy and his consequent retire-
3 ment from professional activity. By the terms of said dissolution plaintiff became sole owner of the claim upon which this cause of action is based.

2. The defendant, James E. Markham, is the duly appointed, qualified, and acting Alien Property Custodian of the United States; and the defendant W. Alexander Julian, is the duly appointed, qualified, and acting Treasurer of the United States.

3. In the year 1935 the Assicurazioni Generali di Trieste e Venezia, an Italian Corporation whose Home Office was located in Trieste, Italy (hereinafter referred to as the "Italian Company"), established a branch in the United States, whose principal office was in New York City. Said branch was named General Insurance Company of Trieste & Venice, and is hereinafter referred to as the "United States Branch."

4. Cabell & Cabell acted as general counsel for the company in connection with its American business upon an annual retainer of $5,000, from the establishment of said Branch until April 30th, 1941. On that day, owing to international conditions, and the possibility of a war between this country and Italy, it was mutually agreed between the Manager of the company's United States Branch, and Cabell & Cabell, that the retainer arrangement should be terminated and the services thereafter to be rendered by the firm should be charged and paid for from time to time.

5. The services rendered, together with disbursements incurred in connection therewith, were thereafter charged from time to time in accordance with said arrangement.

6. During the period from April 30th, 1941 until July 25th, 1941, a number of actions were commenced in the
4 New York Courts against the Italian Company, based upon contracts and policies of insurance originally issued in various European countries to residents in such countries. In a number of these cases writs of attachment were issued and served upon various banks and trust companies in New York City, having accounts with the United States Branch of the Italian Company, including the Guaranty Trust Company of New York, which was the trustee-depositary of the statutory trust funds belonging to the United States Branch deposited in trust for the benefit of its American policyholders and creditors required by the New York Insurance Law.

7. Since the Court of Appeals of New York had held in the First Russian Insurance Co. case (253 N. Y. 365) that foreign creditors of an alien company with a Branch in this country could attach the funds of the branch located here and that such attachments were valid as to any excess remaining of said funds, after the payment of all American creditors, and in view of the fact that the United States Branch assets of the said Italian Company exceeded by something like $2,000,000 all its liabilities in this country, steps had to be taken (a) to release attachments, since their continuance would have compelled the New York Superintendent of Insurance to take the Branch over for liquidation, and (b) to protect the Italian Company from judgment in excess of the amounts actually payable under its policies and contracts.

8. Appearances were entered for the defendant Assicurazioni Generali di Trieste e Venezia, in all these suits by Cabell & Cabell; and in those actions in which writs of attachment had been issued, bonds to release the attachments were obtained and the necessary collateral secured from the Home Office of the Company for that purpose. In all cases contracts and policies issued abroad were carefully studied and answers prepared and served, setting up defenses against recovery thereon in our courts.

9. Within a very short time it became evident that the continued operation of the Branch under existing international and local conditions was out of the question, and an agreement was reached with Dr. Ignazio Hornik, the Manager of the United States Branch, who was also an officer (Vice President) on the staff of the Home Office of the Company, that Cabell & Cabell should be presently paid an agreed fee, as well as anticipated disbursements, in advance, for their services to be rendered in the defense of the pending cases against the Company in our Courts, and in defending those which might be brought thereafter. The amount to be paid for these services was fixed at $5,000, and the amount of the estimated disbursements was to be $1,000.

10. While Dr. Hornik was trying to get the formal approval of the company to these amounts, as well as pending charges for services that had already been rendered, other actions were initiated or threatened, and Cabell & Cabell advised the United States Manager that in order to conserve United States assets of the Company, the Superintendent of Insurance should be petitioned to take over the Branch for liquidation. With the approval of said Manager this petition was presented to the New York Superintendent of Insurance, and as a result the United States Branch with all its assets was formally taken over under an order of Court, on July 25th, 1941.

11. In due course Cabell & Cabell filed their claim with the New York Liquidator for services and disbursements in the sum

6 of $21,848.89, which sum included the $5,000 agreed upon for services to be rendered in the pending litigations against the Company and the $1,000 estimated disbursements to be expended in connection therewith. The claim as filed was endorsed as follows:

"The above claim for services and disbursements by Cabell & Cabell, has been submitted to the Home Office of Assicurazioni and has been approved.

(Signed) ASSICURAZIONI GENERALI
By DR. IGNAZIO HORNIK."

12. The New York Superintendent of Insurance disallowed the claim as filed to the extent of $7,000. The disallowance included the $5,000 agreed upon for services to be rendered in connection with pending actions; the $1,000 estimated disbursements in connection therewith; and a further sum of $1,000 for services rendered sometime prior to the order of liquidation, that amount being arbitrarily fixed by the Liquidator in connection with certain consents obtained by Cabell & Cabell from the New York Superintendent for the release of funds out of the statutory trust funds of the United States Branch, the funds so released being intended for investments for account of the Home Office. The ground for the disallowance was that the services rendered and to be rendered and the disbursements to be incurred, were not for the benefit of the United States Branch but for the Home Office, and were, therefore, not properly chargeable against the assets of the Branch. The balance of the claim amounting to $14,848.89 was paid in due time.

13. Relying upon the decision of the New York Court of Appeals in Matter of People (Norske Lloyds Insurance Co.), 242 N. Y. 148, and upon the fact that the contract for services
7 was made with the Manager of the United States Branch although submitted by him for approval by the Home Office of the Company, Cabell & Cabell resisted such disallowance by appropriate court action. The disallowance by the Superintendent of the $7,000 was finally upheld by the New York Court of Appeals (N. Y. Law Journal, February 25th, 1944).

14. There has never been any dispute as to the value of the services rendered. As stated above the consent and approval of the claim by the Home Office was certified by the United States Manager and Vice President of the Company, Ignazio Hornik, certified by endorsement upon the claim as filed with the Liquidator, and the attitude of the New York Superintendent of Insurance as Liquidator, is shown by a letter from Alfred C. Bennett, Attorney for the Superintendent, who had charge of the liquidation, the letter being dated March 21st, 1944, and directed to Mr.

Edward Feldman, the person in charge of the New York Office of the Alien Property Custodian; copy of this letter is attached to this complaint and marked "Exhibit A."

15. The actual disbursements incurred amounted to $922.02, and the claim of $1,000 to cover disbursements, as originally filed, should be reduced to that amount.

16. In view of the fact that under the arrangement made with the United States Branch Manager, the services to be rendered and which were thereafter actually rendered by Cabell & Cabell, were to be paid for in advance as a retainer, and that such payment would have been made but for the contingencies leading to the taking over of the assets of the Branch by the New York Insurance Department, it is submitted that under the decision of the United States Supreme Court in Hicks v. Guinness (269
8 U. S. 71), interest should be allowed upon the claim from July 25th, 1941, the date of the order for liquidation of the United States Branch.

17. On March 11, 1942, one Leo T. Crowley was the duly appointed, qualified and acting Alien Property Custodian, and the said Leo T. Crowley remained in that office until March 27th, 1944. On October 7th, 1942, by Vesting Order No. 218, the said Leo T. Crowley, being then Alien Property Custodian of the United States, vested in himself as such Alien Property Custodian all funds and properties in this country belonging to the Italian Company, including properties of the said United States Branch. On December 9th, 1942, by Vesting Order No. 468, the said Leo T. Crowley, being then Alien Property Custodian, vested in himself as such Alien Property Custodian, the excess, if any, of the reserve fund being retained by the Superintendent of Insurance of the State of New York, as Liquidator of the United States Branch, for the purposes of the domestic liquidation.

18. Upon information and belief, all funds and properties in this country belonging to the Italian Company, including properties of the said United States Branch, with the exception of a small reserve fund now remaining in the hands of the Superintendent of Insurance of New York, as Liquidator of said United States Branch, have been delivered to the said James E. Markham, as Alien Property Custodian of the United States, and there is now in his possession or under his control, as such Alien Property Custodian, ample funds out of which plaintiff's claim, if allowed, can be paid.

19. A notice of this claim dated and verified January 19th,
9 1943, was filed with the Alien Property Custodian on or about that date and by him assigned the number F-38-98-1. An amended and supplemental notice of the claim dated and verified May 1st, 1944, has, at the suggestion of the Alien Property

Custodian, been executed and filed and a new number, to wit, 280 has been assigned thereto.

Wherefore, the plaintiff demands a judgment against the defendants James E. Markham, Alien Property Custodian, and W. Alexander Julian, Treasurer of the United States, directing them to pay to the plaintiff out of the assets of the former United States Branch of the Assicurazioni Generali di Trieste e Venezia, in their possession or under their control, the sum of $6,922.02, with interest thereon at six percent from July 25th, 1941.

CHARLTON OGBURN,
Attorney for Plaintiff.

(Verified on September 11, 1944, by Hartwell Cabell, as Plaintiff.)

Exhibit A, annexed to amended complaint

MARCH 21, 1944.

Re: The General Insurance Company Ltd. of Trieste and Venice (Assicurazioni Generali di Trieste e Venezia)—Fees of Hartwell Cabell, firm of Cabell & Cabell

Mr. EDWARD FELDMAN,
Supervisor, Bank and Insurance Liquidations,
Office of Alien Property Custodian, Room 629,
280 Center Street, New York City.

DEAR MR. FELDMAN: Mr. Hartwell Cabell was in to see me yesterday with reference to the above matter and advised me that his claim has been filed with the Alien Property Custodian under File No. F-38-98-1. According to his information, the matter is being handled in the Alien Property Custodian's office by Mr. James McKenna.

As you will recall, our Bureau disallowed $7,000.00 of Mr. Cabell's claim upon the theory that the services rendered were for the benefit of the Home Office of Home Fund and not for the domesticated United States branch. We allocated $1,000.00 of the claim for services rendered in Ohio, and the proposed transfer of assets to the Italian Superpower Corporation, both of which matters were classified as Home Office matters and not for the benefit of the United States branch. $5,000.00 of the claim was allocated by specific agreement between Mr. Cabell and the
11 Home Office and was in connection with the defen[illegible] of actions brought by Mr. Cabell for one year following the entry of the liquidation order from September 1, 1941, on. $1,000.00 of the claim was for disbursements incurred by him.

As you know, the Court of Appeals has recently affirmed the order of the Appellate Division sustaining our classification of the

$7,000.00 as a foreign claim. Mr. Cabell now advises us that the disbursements incurred by him amounted to $922.02, instead of the $1,000.00 originally stated or claimed by him and that his claim should be modified accordingly.

There was no dispute as to the reasonable and agreed value of his services. In other words, if we had found that this claim were a domestic claim, we would have allowed it for $6,922.02. It is furthermore our opinion (with the exception of the American Citizens Life and Italian Superpower matters, involving $1,000.00 of the claims) that claimant's services were rendered in this country in aid and preservation of the assets which normally, without the intervention of war, would have belonged to the Home Office.

This letter is being addressed to you at the request of Mr. Cabell, who, of course, is anxious to obtain recognition and payment of his claim by the office of the Alien Property Custodian.

Very truly yours,

(Sd) ALFRED C. BENNETT,
Attorney for Superintendent.

ACB:MM.

12 In United States District Court

(Same title.)

Notice of motion to dismiss amended complaint

SIR: Please take notice that upon the amended complaint herein, the defendants James E. Markham, Alien Property Custodian, and W. Alexander Julian, Treasurer of the United States, will move this Court, at a Motion Term thereof to be held in Room 506 of the United States Court House, Foley Square, Borough of Manhattan, City and State of New York, on the 3rd day of October 1944, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for judgment dismissing the amended complaint upon the ground that this Court lacks jurisdiction over the subject matter of the action or that the amended complaint fails to state a claim upon which relief can be granted in that:

(a) The amended complaint shows that the alleged debt upon which plaintiff's claim is based was not owing to or owned by the plaintiff prior to October 6, 1917, as required by Section 9 (e) of the Trading with the Enemy Act, as amended;

(b) The amended complaint discloses that a notice of the alleged claim could not have been filed or an application made with respect thereto prior to the date of the enactment of the

Settlement of War Claims Act of 1928, as required by Section 9 (e) of the Trading with the Enemy Act, as amended;

(c) The remedies provided by Section 9 of the Trading
13 with the Enemy Act, as amended, are not applicable to any action which may have been taken by the Alien Property Custodian under Section 5 (b) of the said Act, as amended by Title III of the First War Powers Act, 1941; and

(d) The plaintiff has not exhausted the administrative remedies available to him with respect to any action which may have been taken by the defendants, or either of them, or with respect to any claim which may have arisen out of any such action,

and for such other, further, and different relief as may be just and proper in the premises.

Dated: New York, N. Y., September 18, 1944.

Yours, etc.,

JAMES B. M. MCNALLY,
United States attorney for the Southern District of New York, Office & Post Office Address: United States Court House, Foley Square, New York 7, N. Y.

HARRY LEROY JONES,
Acting Chief, Alien Property Unit.

Of Counsel:

JOHN ERNEST ROE,
General Counsel to the Alien Property Custodian.

14 J. A. FRIDINGER,

Attorney, Alien Property Unit, War Division, Department of Justice, Washington, D. C., Attorneys for the Defendants, James E. Markham, Alien Property Custodian, and W. Alexander Julian, Treasurer of the United States.

To CHARLTON OGBURN, Esq.,
Attorney for Plaintiff,
68 William Street, New York, N. Y.

15 In United States District Court, Southern District of New York

(Same title.)

Hartwell Cabell (Plaintiff).

Charlton Ogburn, Esq., Attorney for Plaintiff.

John F. X. McGohey, Esq., United States Attorney for the Southern District of New York.

Harry LeRoy Jones, Esq., Chief, Alien Property Unit.

Irving J. Levy, Esq., Attorney, Alien Property Unit, Attorneys for the Defendants. Of Counsel: William L. Lynch, Esq., Assist-

ant U. S. Attorney. John Ernest Roe, Esq., General Counsel to the Alien Property Custodian.

Opinion of Bright, D. J.

The novel question presented by the defendants' motion to dismiss the complaint is whether or not plaintiff, at all times a citizen of this country and at no time tainted with any enemy alien affiliations, who admittedly has a meritorious claim against an alien enemy whose property was on October 7, 1942, seized by the Alien Property Custodian, for attorney's services rendered in 1935 and thereafter, is precluded from recovering it by the provisions of Section 9 (e) of the Trading With the Enemy Act as amended (40 Stat. 411 et seq, 50 U. S. C. app. Sec. 9 (e)) which states that in no event "shall a debt be allowed under this Section unless it was owing to and owned by the claimant prior to October 6, 1917 * * *; nor shall a debt be allowed under this Section unless notice of claim has been filed, or application therefor has been
16 made, prior to the date of the enactment of the Settlement of War Claims Act of 1928" (Act March 10, 1928, c. 167).

The allegations of the complaint must be deemed admitted. So far as important, they are that this action arises under the Trading With the Enemy Act as amended; that in 1935 an Italian insurance company established a branch in the United States; that plaintiff's firm, of whose claim he is now the sole owner, rendered legal services to the Italian company, and incurred certain disbursements between 1935 and April 30, 1941, of the reasonable value of $6,000 plus $922.02 disbursements, the validity and justice of which has been admitted by the Italian company and is conceded here; that on October 7, 1942 and December 9, 1942, the Alien Property Custodian vested in himself all of the funds and properties of the Italian company for the purpose of domestic liquidation, ample in amount to pay the plaintiff's claim; that a notice of plaintiff's claim was filed with the Custodian on January 19, 1943, which was amended on May 1, 1944, at the suggestion of the Custodian; and has not been paid.

It is thus apparent that the debt was not "due and owing" prior to October 6, 1917, and that notice of claim could not be filed prior to March 10, 1928. For these reasons, defendants contend that the motion must be granted. Plaintiff, admitting that his claim does not come within the strict word of the Act under which he sues, argues that the spirit of the Act clearly contemplated that he should be protected.

It is obvious that Congress in the Trading With the Enemy Act, while generally authorizing the appointment of an Alien Prop-

erty Custodian and not confining such authorization to World War I, at least, insofar as the rights of the American citizens
17. are concerned to recover their debts from the property of alien enemies seized by the Alien Property Custodian, has literally confined such rights to those accrued prior to the first World War. No question is made but that this suit is in effect against the United States and cannot be maintained unless the government has consented thereto. Congress obviously did not envision another conflict such as that in which we are now engaged, or the accrual of claims such as this arising by reason of it. In view of its intent to do justice to creditors of former enemy aliens, it undoubtedly would be so inclined toward those similar creditors who are affected by the present conflict. Can that result be obtained by any construction of the 1917 Act and its amendments without a further congressional authorization, is the question posed.

The original Act imposed no such restrictions. The original Section 9 provided that "Any person, not an enemy or ally of an enemy, * * * to whom any debt may be owing from an enemy, * * * whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian hereunder, and held by him or by the Treasurer of the United States, may file * * * a notice of claim * * * and may at any time before the expiration of six months after the end of the war, institute a suit in equity * * * to establish the * * * debt so claimed." &c.

It did not refer to any particular war. It was not until June 5, 1920, that subdivision (e) was added and then the only restriction was that the debt must have been owing to and owned by the claimant prior to October 6, 1917. The six months limitation in the original section was extended to eighteen months by the Act of February 27, 1921, c. 76, and to thirty months by the Act of December 27, 1922, c. 13. The further restriction that notice of claim must be filed prior to the enactment of the settle-
18 ment of the War Claims Act was added on March 10, 1928.

Thus, it is argued, that inasmuch as the original Section 9 has not in its then terms been materially altered, this court may assume that the spirit of the Act was to pay citizen creditors out of the moneys impounded by the Alien Property Custodian in any way, particularly in a case such as this where it is impossible to comply with conditions subsequently imposed.

I do not think that this court can go so far in face of the actual terms of the statute and its amendments. To do so would require me to rewrite the statute to include another date when the claim must be owing, when it must be presented for collection,

when it must be filed, and to prevent World War I claims from creeping in for representation. The Act as amended does not wipe out plaintiff's claim; the most that can be said is that recovery is postponed until after the war, or at least until Congress recognizes the obvious inequality or injustice of the situation as affecting creditors of alien enemies such as plaintiff here, and shall amend the Trading With the Enemy Act to make provision for recoveries in cases arising out of the present conflict.

It is further urged that if the Act is construed as to defeat plaintiff's remedy, it is unconstitutional. I do not think that question arises in this suit which, it is pleaded, "arises under the Trading With the Enemy Act of October 6, 1917 (40 Stat. L. 411), as amended and supplemented." Plaintiff cannot, in my opinion, seek the benefit (obviously illusory) of that enactment, and, at the same time, seek its nullification. He might, more appropriately, and probably with more success, seek his remedy in Congress which has not, under similar circumstances, turned a deaf ear to equally meritorious obligations of our citizens. The absence of any method for collecting the debt out of the funds in possession
19 of the Alien Property Custodian is not a defect rendering the statute unconstitutional (Kogler v. Miller, 288 Fed. 806–808), for no property right had been taken from the plaintiff. Pusey & Jones Company v. Hannsen, 261 U. S. 491–497. The case of Becker Company v. Cummings, 296 U. S. 74, is not determinative of constitutionality. There doubtful constitutionality was founded upon a seizure commanded by statute "if the remedy given (by Section 9 (a)) were inadequate to secure to the non-enemy owner either the return of his property or compensation for it." None of plaintiff's property was here seized.

The motion to dismiss is granted, without prejudice.

JOHN BRIGHT,
United States District Judge.

Dated January 3, 1945.

20 In United States District Court, Southern District of New York

(Same title.)

Order and judgment

The defendants having moved herein by a notice of motion dated September 18, 1944, for judgment dismissing the amended complaint, and said motion having come on to be heard before the undersigned on the 28th day of November 1944, and after hearing John F. X. McGohey, United States Attorney for the

Southern District of New York, attorney for the defendants (William L. Lynch, Assistant United States Attorney, of counsel), in support of the motion, and Charlton Ogburn, Esq., attorney for the plaintiff (Hartwell Cabell, Esq., plaintiff in person, of counsel), in opposition, and the undersigned having filed a written opinion dated January 3, 1945, directing that the motion be granted without prejudice,

Now, upon motion of John F. X. McGohey, United States Attorney for the Southern District of New York, attorney for the defendants, it is

Ordered, that the defendants' motion to dismiss the amended complaint be and the same hereby is in all respects granted without prejudice; and it is

Further ordered and adjudged, that the amended complaint herein be and the same hereby is dismissed for lack of jurisdiction without prejudice.

Dated New York, N. Y., January 10th, 1945.

Approved:

JOHN BRIGHT, *U. S. D. J.*

Judgment rendered this 11th day of January 1945.

GEORGE J. H. FOLLMER, *Clerk.*

21 In United States District Court

[Title omitted.]

Notice of appeal

SIRS: Please take notice that the above named plaintiff herein, Hartwell Cabell, hereby appeals to the Circuit Court of Appeals for the Second Circuit, from the Order dismissing the Amended Complaint herein, without prejudice, and from the final judgment rendered pursuant to the aforesaid Order and entered in this action on January 11th, 1945, and from each and every part of said Order and Judgment.

Dated New York, N. Y., January 18, 1945.

Yours, etc.,

CHARLTON OGBURN,

Attorney for Plaintiff, Office and Post Office Address, 68 William Street, Borough of Manhattan, New York City.

22 To:

JOHN F. X. MCGOHEY, Esq.,
United States Attorney for the Southern District of New York.

CLERK OF THE UNITED STATES DISTRICT COURT,
For the Southern District of New York.

In United States Circuit Court of Appeals for the Second Circuit

[Title omitted.]

Designation of contents of record on appeal

Please take notice that the Appellant herein designates the following as the contents of the record on appeal:

1. Statement required by Rule XIII.
2. Notice of Appeal.
3. Amended Complaint.
4. Notice of Motion to Dismiss the Amended Complaint.

23 5. Opinion of Court on motion for judgment dismissing the amended complaint.

6. Final Order and Judgment.
7. Designation of contents of record.
8. Stipulation that copy of record is a true transcript.

Dated New York, January 24th, 1945.

CHARLTON OGBURN,
68 William Street, New York City,
Attorney for the Appellant.

To JOHN F. X. MCGOHEY, Esq.,
United States Attorney for the Southern District of New York,
Attorney for Appellees.

24 In the United States Circuit Court of Appeals for the Second Circuit

(Title omitted.)

Stipulation as to record

It is hereby stipulated and agreed that the foregoing is a true and correct Transcript of the Record of the District Court as agreed upon by the parties.

Dated New York, N. Y., February 13, 1945.

CHARLTON OGBURN,
Attorney for Plaintiff-Appellant.
JOHN F. X. MCGOHEY,
United States Attorney,
Attorney for Defendants-Appellees.

25 [Clerk's certificate to foregoing transcript omitted in printing.]

26 In United States Circuit Court of Appeals for the Second Circuit

No. 279—October Term, 1944

(Argued March 14, 1945—Decided April 3, 1945)

HARTWELL CABELL, APPELLANT

v.

JAMES E. MARKHAM, ALIEN PROPERTY CUSTODIAN, AND W. ALEXANDER JULIAN, TREASURER OF THE UNITED STATES, APPELLEES

Before L. HAND, AUGUSTUS N. HAND, and CLARK, Circuit Judges.

Appeal from a judgment of the District Court of the Southern District of New York, dismissing a complaint filed under § 9 (a) of the Trading With the Enemy Act, by the creditor of an alien whose property had been seized by the Alien Property Custodian.

HARTWELL CABELL, *pro se.*

WILLIAM L. LYNCH, *for the appellees.*

Opinion

27 L. HAND, C. J.:

This appeal depends upon the meaning of a part of the proviso to § 9 (e) of the Trading with the Enemy Act, as amended on March 10, 1928, which we quote in the margin.* The plaintiff filed a complaint under § 9 (a) of that act, alleging that he was a creditor of an Italian insurance company, whose assets in this country the predecessor in office of the defendant, Markham, had seized, as Alien Property Custodian; and that he had presented his claim in due form to the Custodian, who refused to recognize it. The defendants moved to dismiss the complaint because of its insufficiency in law, on the ground that the claim had not been in existence before October 6, 1917, and had not been filed before the date of the enactment of the Settlement of War Claims Act of 1928. The judge held that, since both these facts appeared in the complaint, the proviso of § 9 (e) just quoted covered the situation; and for this reason he dismissed the complaint.

When the Trading with the Enemy Act was first passed on October 6, 1917, it contained the substance of what is now subdivision (a), but nothing more. It was amended again and again, but

*"nor in any event shall a debt be allowed under this section unless it was owing to and owned by the claimant prior to October 6, 1917, and as to claimants other than citizens of the United States unless it arose with reference to the money or other property held by the Alien Property Custodian or Treasurer of the United States hereunder; nor shall a debt be allowed under this section unless notice of the claim has been filed, or application therefor has been made, prior to the date of the enactment of the Settlement of War Claims Act of 1928."

subdivision (e) was not added until 1920 (41 St. L. 90), though from the first it provided that no debt should be paid which had not been "owing" before October 6, 1917. The addition that the claim should be presented before March 10, 1928, dates from
28 the amendment of that year. (45 St. L. 271). The statute was not reenacted when the present war broke out; nor was that necessary, for it automatically went into effect again. This appears, for example, from the definition of the phrase, "beginning of the war," in § 2 (e), ("the day on which Congress has declared or shall declare war"); from § 302 of Title III of Chapter 593 of Laws of the First Session of the 77th Congress (55 St. L. p. 839), which assumes that it had not been in force before December 8, 1941, and that it went into effect again at once thereafter; and because § 5 (b) was amended without mention of any other part (55 St. L. 839, 840). For this reason it seems proper for purposes of interpretation to interpret it as though it had been enacted on December 8, 1941, when the present war was declared. Were that literally the case, we should be faced with a statute, subdivisions (a) and (e) of which flatly contradicted each other. Subdivision (a) provides that "any person * * * to whom any debt may be owing * * * may file * * * a notice of his claim * * * and the President * * * may order the payment * * * of the money * * * held." If the President does not order payment, the "said claimant may institute a suit in equity * * * to establish the debt so claimed and if so established the court shall order the payment * * * to which the * * * claimant is entitled." This language is mingled with that giving a remedy for property mistakenly seized, and it is unnecessary to labor the point that it was intended to put creditors upon an equal footing with owners. Indeed, although we assume it to be true that for constitutional purposes it was not necessary to allow the alien's creditors any recourse to the seized property, since the alien himself remains liable; for practical purposes there is little difference between debts and claims to property.

It is at least arguable that the whole of subdivision (e) is limited to seizures made during the first war. It begins with a pro-
29 vision that "a citizen or subject of any nation which was associated with the United States in the prosecution of the war" may recover his property or collect his debt only in case that nation gave reciprocal rights to citizens of the United States. The use of the preterite is significant, particularly when coupled with the word, "associate," which it will be remembered was chosen during the last war in sedulous avoidance of any implication that we had "allies." If this be true, it would be indeed unreasonable not to confine the proviso similarly: that is, to read it otherwise

than as limited to seizures made during that war. If we do not so read it, the result is really nonsense, for the remedy given in subdivision (c), which is prospective, is completely defeated by subdivision (e). Nobody can seriously believe that a general plan designed to be successively suspended and revived, as peace and war should alternate, was meant to be permanently mutilated by a statute of limitation expressly made applicable to only the first of its phases. The defendants have no answer except to say that we are not free to depart from the literal meaning of the words, however transparent may be the resulting stultification of the scheme or plan as a whole.

Courts have not stood helpless in such situations; the decisions are legion in which they have refused to be bound by the letter, when it frustrates the patent purpose of the whole statute. We need cite no others than the more recent of those in the the Supreme Court which have followed Holy Trinity Church v. United States, 143 U. S. 457. Pickett v. United States, 216 U. S. 456, 461; American Surety Company v. District of Columbia, 224 U. S. 491, 495; Ozawa v. United States, 260 U. S. 178, 194; United States v. Katz, 271 U. S. 354, 362; Sorrells v. United States, 287 U. S. 435, 446–448. See also United States v. Ryan, 284 U. S. 167, 175; Armstrong v. Nu-Emanel Corp., 305 U. S. 315, 333; and United States v. American Trucking Associations, 310 U. S. 534, 543, 544. As Holmes, J., said in a much quoted passage from Johnson v. United States, 163 Fed. Rep. 30, 32: "it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before." See also Van Beeck v. Sabine Towing Co., 300 U. S. 342, 351; Keifer & Keifer v. Reconstruction Finance Corp., 306 U. S. 381, 391; United States v. Hutcheson, 312 U. S. 219, 235. Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning. Since it is utterly apparent that the words of this proviso were intended to be limited to seizures made during the last war, and could not conceivably have been intended to apply to seizures made when another war revived the Act as a whole from its suspension, it does no undue violence to the language to assume that it was implicitly subject to that condition which alone made the Act as a whole practicable of administration.

Judgment reversed.

31 In United States Circuit Court of Appeals,
Second Circuit

Present: Hon. LEARNED HAND, Hon. AUGUSTUS N. HAND, Hon. CHARLES E. CLARK, Circuit Judges.

HARTWELL CABELL, PLAINTIFF-APPELLANT

v.

JAMES E. MARKHAM, ALIEN PROPERTY CUSTODIAN, AND W. ALEXANDER JULIAN, TREASURER OF THE UNITED STATES, DEFENDANTS-APPELLEES

Judgment

Filed May 2, 1945

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

ALEXANDER M. BELL, *Clerk.*

[Clerk's certificate to foregoing transcript omitted in printing.]

34 Supreme Court of the United States

Order allowing certiorari

(Filed June 4, 1945)

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] Enter Attorney General. File No. 49724. U. S. Circuit Court of Appeals, Second Circuit. Term No. 76. James E. Markham, Alien Property Custodian, and W. Alexander Julian, Treasurer of the United States, Petitioners vs. Hartwell Cabell. Petition for writ of certiorari and exhibit thereto. Filed May 15, 1945. Term No. 76 O. T. 1945.

* U. S. GOVERNMENT PRINTING OFFICE: 1945